2007

Arbogast Family Trust v. River Crossings, LLC : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ARBOGAST FAMILY TRUST, Plaintiff/Appellee, vs. **RIVER CROSSINGS, LLC** Defendant/Appellant.	Appellate No. 20070395

REPLY BRIEF OF APPELLANT

On Appeal from the Fifth Judicial District Court in and for Washington County, Utah
Civil No. 060500096

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ORAL ARGUMENT REQUESTED

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I. THE DEFAULT JUDGMENT AGAINST RIVER CROSSINGS IS VOID.

Arbogast wrongly contends that River Crossings cannot appeal the district court's denial of its Rule 60(b) motion on the basis that the default judgment was void for lack of jurisdiction because it constitutes an attack on the default judgment itself. (Br. of Appellee at 15.) This Court has already directly ruled that River Crossings' appeal of the order denying River Crossings' Rule 60(b) motion was timely. (See Ruling attached as Exhibit A.) One of the reasons expressly set forth in Rule 60(b) as proper grounds for setting aside a default judgment is that the judgment was "void." Utah R. Civ. P. 60(b)(4).

As explained in detail in River Crossings' opening brief, the default judgment at issue in this case was void because Arbogast failed to notify River Crossings of the default proceedings through service of the default documents it filed as required by Rule 5(a). Utah R. Civ. P. 5(a)(2)(B). River Crossings' lack of notice of the default proceedings was at the very core of its Rule 60(b) motion and the central issue in this appeal. It goes without saying that the legal effect of lack of notice is lack of jurisdiction and a void judgment. Meyers v. Interwest Corp., 632 P.2d 879, 881 n.2 (Utah 1981).

Moreover, regardless of whether it was directly addressed below, "a lack of jurisdiction can be raised by the court or either party at any time." A.J. Mackay Co. v. Okland Constr. Co., 817 P.2d 323, 325 (Utah 1991). The district court never had the chance to consider the legal effect of lack of notice on the court's jurisdiction because it incorrectly concluded that River Crossings had sufficient notice. If this Court concludes

that Arbogast failed to serve River Crossings with documents filed with the Court concerning the default, or that River Crossings lacked proper notice of the default proceedings as required by Rule 5(a), then it must find that the district court lacked jurisdiction to enter default judgment against River Crossings. Meyers, 632 P.2d at 881 n.2. It further must find that the default judgment was void and that the district court erred in refusing to set it aside pursuant to River Crossings' timely Rule 60(b) motion.

II. RIVER CROSSINGS' LACK OF NOTICE OF THE DEFAULT PROCEEDINGS WAS DIRECTLY AT ISSUE IN THIS CASE.

Arbogast's argument that the district court did not have the opportunity to address claims of lack of notice under URCP Rule 5(a) is flatly refuted by the district court's own language. In its order denying River Crossings' Rule 60(b) motion, the district court stated as follows:

> That pursuant to URCP Rule 5(a)(2), Defendant's counsel has not formally appeared in the instant action. Nevertheless, Defendant's counsel's notification and communications with Plaintiff's counsel constitute an appearance . . . .

(R. at. 120) (emphasis added). The district court not only considered River Crossings' notice claims within the context of Rule 5(a)(2), but in fact held that River Crossings was entitled to notice under Rule 5(a)(2). River Crossings' appeal of the district court's order on the grounds that Arbogast failed to comply with Rule 5(a)(2) is therefore entirely proper.

The transcript excerpts cited by Arbogast as evidence that River Crossings conceded that Rule 5(a)(2) did not apply are vague and irrelevant.[1] Statements by counsel regarding conclusions of law are not binding on River Crossings or the courts. In re Hansen's Estate, 184 P. 197, 203 (Utah 1919). ("[W]e think this was but an admission of a legal conclusion and is binding neither upon appellant nor upon the court. It is the duty of the court to declare the law as it exists, regardless of what a party or his counsel may concede to be the law.") On appeal, conclusions of law are reviewed for correctness, regardless of counsels' mistaken assumptions as to matters of law. Lund v. Brown, 2000 UT 75 ¶¶ 8, 12, 11 P.3d 277. This is particularly pertinent in this case given that the "Utah Rules of Civil Procedure are not a model of clarity in explaining notice requirements to parties in default." Lund v. Brown, 2000 UT 75 ¶ 21.

Furthermore, River Crossings tirelessly raised the issue of lack of notice of the default proceedings at every stage in this litigation. In its Rule 60(b) Motion, River Crossings repeatedly declared that it thought it was entitled to notice prior to default under Utah law and that no notice was given. (R. at 53, 54, 55.) River Crossings' Reply Memorandum is likewise replete with claims of lack of notice. (R. at 97, 99, 101.) River Crossings raised and preserved this issue for appeal, regardless of whether it cited to the

[1] Although not reflected in the transcript itself, the two sentences immediately preceding the material quoted by Arbogast are actually quotes from Interstate Excavating, Inc. v. Agla Development, 611 P.2d 369 (Utah 1980), the case cited by River Crossings' counsel at the hearing. (Tr. at 24.) With that context in mind, it is unclear whether the statements of River Crossings' counsel quoted by Arbogast are a reference to the Interstate case or to the present matter.

specific legal authority best supporting its entitlement to notice. To suggest that the district court was somehow blindsided by this issue is both incorrect and unfair.

III. RIVER CROSSINGS' APPEARANCE ENTITLED IT TO SERVICE OF ALL PLEADINGS UNDER RULE 5(a)(2).

A. River Crossings Made an Appearance in the Case.

The district court correctly concluded that "Defendant's counsel's notification and communications with Plaintiff's counsel constitute an appearance" under Rule 5(a)(2). (R. at 120.) On December 20, 2005, Arbogast's counsel, Chad Utley, received a letter from the Nevada firm of Black Lobello & Sparks, informing him that River Crossings had retained its legal services. (R. at 118.) From the time Arbogast filed its Complaint, Mr. Utley was engaged in ongoing communication with River Crossings' counsel. (R. at 58.) Mr. Utley granted at least two extensions to file a responsive pleading to River Crossings' counsel. (R. at 88-89, 118.) River Crossings' counsel participated in extended settlement negotiations with Mr. Utley from December 20, 2005 through at least June 29, 2006. (R. at 91, 118-19.)

Although Arbogast does not dispute these facts, it takes issue with the district court's conclusion that River Crossings' actions constituted an appearance under Rule 5(a)(2)(B). Arbogast contends that only a party making a "formal appearance," however that may be defined, is entitled to service under the Rule. This is simply not correct. No basis whatsoever exists in the plain language of Rule 5(a)(2)(B) for any distinction between a "formal" or "informal" appearance. The Rule simply provides that only a

"failure to appear" exempts the opposing party from the service requirements of Rule 5(a)(2).

Although courts in Utah and other jurisdictions have used the phrase "formal appearance" to describe an appearance made by filing a pleading or appearing before the court. Arbogast has not cited to any case law supporting its proposition that only such a "formal appearance" brings a party within the scope of Rule 5(a)(2)(B).[2] To the contrary, courts interpreting the language of the Rule's federal counterpart, Rule 5(a) of the Federal Rules of Civil Procedure, have directly held that an appearance for purposes of Rule 5(a) is "not confined to physical appearances in court or the actual filing of a document in the record." N.Y. Life Ins. Co. v. Brown, 84 F.3d 137 (5th Cir. 1996) (internal citations omitted).

> Appearances include a variety of informal acts on defendant's part which are responsive to plaintiff's formal action in court, and which may be regarded as sufficient to give plaintiff a clear indication of defendant's intention to contest the claims. In summary, an appearance is an indication in some way of an intent to pursue a defense. This is a relatively low threshold.

[2] Arbogast cites to Lund v. Brown, 2000 UT 75, as distinguishing between a formal and informal appearance, but the quote cited actually only distinguishes between a party making an appearance and a party that "never made an appearance." Id. at ¶ 22. Likewise, in Central Bank & Trust v. Jensen, 656 P.2d 1009, 1011 (Utah 1982), the defaulting party had not made any appearance in the case, whether designated as "formal" or "informal."

Id. (emphasis added) (cited in Wright & Miller, Fed. Prac. & Proc. § 1144); accord Sun Bank of Ocala v. Pelican Homestead & Savs. Assoc., 874 F.2d 274, 276 (5th Cir. 1989); U.S. v. McCoy, 954 F.2d 1000, 1003 (5th Cir. 1992).[3]

River Crossings' "informal acts" gave Arbogast a clear indication of its intent to defend against the claim through its retention of counsel, its multiple requests for extension of time to file a responsive pleading, and its ongoing settlement negotiations. Arbogast could never have been in doubt that River Crossings intended to pursue—and was in fact pursuing—a defense of the claim. As found by the district court, River Crossings' acts therefore constituted an appearance in this case for purposes of Rule 5(a).

This application of Rule 5(a) perfectly comports with Rule 14-301(16) of the Utah Supreme Court Rules of Professional Practice, which states: "Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected." (Emphasis added.) This standard does not require a "formal appearance" as a prerequisite to providing notice of default but merely knowledge of the identity of opposing counsel. Arbogast admittedly and indisputably had such knowledge.

The lack of distinction between formal and informal appearances for purposes of Rule 5(a)(2)(B) is also consistent with the policy behind the rule. "The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for

[3] Because the Utah Rules of Civil Procedure were "fashioned after the Federal Rules of Civil Procedure, [Utah courts] may look to decisions under the federal rules for guidance." 438 Main Street v. Easy Heat, Inc., 2004 UT 72 ¶ 64 (citing Winegar v. Slim Olson, Inc., 252 P.2d 205 (1953)).

a hearing on the merits of every case." Heathman v. Fabian & Clendenin, 377 P.2d 189 (Utah 1962); accord Lund v. Brown, 2000 UT 75 ¶ 10. It is "important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them." Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975). That being said, there is no sound policy reason for entitling counsel who has made a "formal" appearance by merely filing some document concerning a complaint to notice of default while setting a trap for those who may have had extensive negotiations and contact with opposing counsel but have not yet filed a responsive pleading.

To the extent that Utah case law were to suggest a distinction between a formal and informal appearance for purposes of service under Rule 5(a)(2)(B)—which it does not—it would do so in violation of well-settled rules of construction:

> [I]n construing any statute, "we first examine the statute's plain language and resort to other methods of statutory interpretation only if the language is ambiguous." Accordingly, we read the words of a statute literally unless such a reading is unreasonably confused or inoperable, and give the words their usual and accepted meaning. Third, the reviewing court does not look beyond the plain and unambiguous language to ascertain legislative intent. Finally, we presume that the "statute is valid and that the words and phrases used were chosen carefully and advisedly.

Salt Lake County Bd. of Equal. v. Tax Comm'n, 2004 UT App 472, 106 P.3d 182 (emphasis added) (internal citations omitted). Because nothing in the plain language of Rule 5(a)(2)(B) makes any distinction whatsoever between so-called formal versus

informal appearances for purposes of service under Rule 5(a)(2)(B), the courts must interpret the Rule accordingly.

B. River Crossings Was Entitled to Service of All Pleadings.

The district court correctly concluded that because River Crossings appeared in the case, it was entitled to notice of the default proceedings under Rule 5(a)(2).

> That pursuant to URCP Rule 5(a)(2), Defendant's counsel has not formally appeared in the instant action. Nevertheless, Defendant's counsel's notification and communications with Plaintiff's counsel constitute an appearance and there was adequate notice was [sic] given to Defendant, pursuant to the June 29, 2006 letter, than an answer was required to be filed in response to Plaintiff's complaint.

(R. at 120.) Despite the clear reference to Rule 5(a)(2) and the court's discussion of the appearance requirement in that context, Arbogast strangely suggests that the district court merely held that River Crossings' appearance entitled it to notice of default—but not pursuant to Rule 5(a)(2). What Arbogast fails to elaborate upon is which rule or statute might possibly entitle River Crossings to notice of default if not Rule 5(a)(2).

Clearly, the district court concluded that River Crossings' appearance entitled it to notice of default pursuant to Rule 5(a)(2). However, River Crossings' appearance entitled it not merely to *notice* of the default proceedings, which it did not receive, but more specifically to "be served with all pleadings and papers." Utah R. Civ. P. 5(a)(2)(B). It is undisputed that Arbogast did not serve River Crossings with the Default Certificate, which it filed with the district court on July 31, 2006 (R. at 32), nor with its request for Default Judgment, which it filed on August 11, 2006 (R. at 35). As a direct

result of Arbogast's failure to comply with Rule 5(a)(2), default judgment was improperly and unfairly entered against River Crossings.

The district court apparently considered it unimportant that Arbogast had failed to comply with the plain language of Rule 5(a)(2) in obtaining its default judgment against River Crossings and instead concluded that the June 29, 2006 Letter sent by Arbogast satisfied the unambiguous demands of service under Rule 5(a)(2). Arbogast adopts this argument, stating in its brief that it satisfied Rule 5(a)(2) by mailing the June 29 Letter. (Br. of Appellee at 25.) In reality, this Letter merely requested the filing of a responsive pleading, did not even mention the word "default," and can in no way be found to be a substitute for service under the Rule of the documents filed with the district court to obtain the default judgment.

Arbogast curiously characterizes the Letter as effectively saying, "If you don't file within 20 days we are going to default you." (Br. of Appellee at 40.) But the whole point is that the Letter did not say that—and in light of Mr. Utley's prior assurances that he would not file for default without notifying River Crossings, opposing counsel simply did not understand this Letter to communicate that message. Furthermore, the Letter was sent one month before Arbogast initiated default proceedings against River Crossings—certainly not an adequate substitute for actual *service* of the Default Certificate and request for Default Judgment on River Crossings.

Arbogast failed to act in accordance with the service requirements of Rule 5(a)(2) with regard to the default proceedings, depriving River Crossings of the notice to which it was entitled. There is nothing in the June 29 Letter that alters that fact.

IV. RIVER CROSSINGS PRESENTED A REASONABLE JUSTIFICATION FOR FAILING TO FILE A RESPONSIVE PLEADING.

Arbogast has conceded that River Crossings' Rule 60(b) motion was timely filed and presented meritorious defenses. (Br. of Appellee at 36.) The sole issue in dispute then is whether River Crossings demonstrated a reasonable justification or excuse for its failure to file a responsive pleading. It clearly did.

First, River Crossings reasonably, and correctly, believed that default could not be entered against it without notice from Arbogast. As set forth in detail above, had Arbogast complied with the requirements of Rule 5(a)(2) by serving the default certificate and request for default judgment, the default judgment would not, and could not, have been taken against River Crossings.

Even if River Crossings had been mistaken in its belief that notice was required, it would still be entitled to relief under Rule 60(b). Rule 60(b)(1) expressly provides that a judgment may be aside set aside if it is the result of "mistake, inadvertence, surprise, or excusable neglect." Utah R. Civ. P. 60(b)(1) (emphasis added). Although Arbogast expressly acknowledges that any of these factors is grounds for relief under Rule 60(b)(1), it focuses its discussion solely on the "excusable neglect" prong and its alleged requirement of due diligence. (Br. of Appellee at 28.) Contrary to Arbogast's belabored argument, due diligence is not a requirement for each of the Rule 60(b)(1) factors.

In reality, the definition of reasonable justification under Rule 60(b) is much broader than that. As the Utah Supreme Court held in Lund v. Brown, 2000 UT 75, a "good faith, legitimate belief that no action would or could be taken . . . constitutes a

'reasonable justification or excuse' for the failure to reply." Lund at ¶ 19. Movants need not "show that their interpretation of [the] law is legally correct, but merely that they possessed a reasonable good faith belief" in their interpretation. Id. at ¶ 16.

Such was precisely the case at hand. Based on Mr. Utley's express representations that he would not initiate default proceedings against River Crossings without first notifying opposing counsel, River Crossings reasonably and justifiably believed that no action would be taken against it without such notice. (R. at 96-97.) Mr. Utley has admitted that he made such a representation. (Br. of Appellee at 34.)

River Crossings also reasonably believed that settlement negotiations were ongoing. (R. at 50 ¶¶ 16, 102.) As evidence of its good faith belief that settlement negotiations were continuing, River Crossings submitted a copy of an email message from River Crossings to Arbogast. (R. at 50 ¶¶ 16, 59, 102.) This email showed on its face that it was sent from Mike Chernine to Rod Arbogast on Tuesday, July 25, 2006 at 1:47 PM. Id.

Arbogast has never denied that it received this email. Instead, for the first time at the hearing on River Crossings' Rule 60(b) motion, Arbogast made an untimely motion to strike the email as unsupported by an affidavit. River Crossings had no opportunity to respond to the motion. (Tr. at 3-4.) In fact, the email was supported by an affidavit from River Crossings' counsel. (R. at 50 ¶¶ 16, 59.) Additionally, Mr. Chernine was present at the hearing, and River Crossings proffered his testimony to support the fact that he sent the email message. (Tr. at 4.) The district court declined to hear Mr. Chernine's testimony and never ruled on the motion. (Tr. at 4-5.)

Instead, the district court simply ignored the email in its findings of fact, concluding contrary to the record that there was no communication between River Crossings and Arbogast after the June 29 Letter. (R. at 117, ¶¶ 20, 22.) River Crossings directly contested this finding in its opening brief. (Br. of Appellant at 19-20.)

Arbogast responded that its counsel had directed that all communications should go directly to them, that the email from Chernine to Arbogast did not comply with that direction, and that River Crossings failed to marshal the evidence because it did not note that direction. (Br. of Appellee at 38-39.) That fact, however, is simply not relevant to the issue of whether River Crossings reasonably believed that settlement negotiations were ongoing. Regardless of the propriety of Mike Chernine communicating directly with Rod Arbogast, the fact remains that Mr. Chernine sent the email and reasonably believed that settlement negotiations were continuing as a result.

Arbogast also argues that the Court should not consider the email because River Crossings did not prove that Arbogast received the email. (Br of Appellant at 39.) The text of the email itself proves that it was sent, as does the supporting affidavit. Mr. Chernine offered to testify further to the fact that he sent the email but was rebuffed. River Crossings more than met its burden of proving that the email was sent. The burden therefore rested on Arbogast to prove that it wasn't received. Arbogast has never even denied that it received the email.

In any event, the issue of whether Arbogast received the email is also irrelevant to the issue of whether River Crossings reasonably believed that settlement negotiations were ongoing. Regardless of whether Arbogast received the email, there is no dispute

that River Crossings sent the email and that it believed settlement negotiations were continuing.

Because River Crossings presented reasonable justifications for failing to file a responsive pleading to Arbogast's complaint, the district court abused its limited discretion in refusing to set aside the default judgment pursuant to River Crossings' Rule 60(b) motion. As the Utah Supreme Court has declared, "it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside." Lund at ¶ 11 (emphasis added).

V. ARBOGAST IS NOT ENTITLED TO ATTORNEYS' FEES.

Even if Arbogast were to somehow prevail on appeal, it should not be awarded its attorneys' fees. The district court awarded attorneys' fees to Arbogast based on a provision in the Trust Deed Note which presumes to require River Crossings to "pay all costs and expenses of collection including a reasonable attorney's fee." (R. at 82.) However, this appeal does not go to the merits of Arbogast's contractual collection efforts against River Crossings. Rather, it goes solely to legal questions, which Arbogast and the Utah Supreme Court have conceded are "not the model of clarity." Because this appeal does not directly relate to Arbogast's collection efforts under the Trust Deed Note, it is not entitled to attorneys' fees on appeal should it prevail.

CONCLUSION

Despite the service requirements of Rule 5(a)(2) and the express representations of opposing counsel, River Crossings did not receive notice from Arbogast of its initiation

of default proceedings until default judgment had already been entered River Crossings was reasonably justified in failing to defend itself based on its good faith belief that no action could or would be taken against it without notice. For these reasons, the district court abused its discretion in refusing to set aside the default judgment against River Crossings.

DATED this 31st day of December. 2007.

VAN COTT. BAGLEY, CORNWALL & MCCARTHY

By: Scott M. Lilja

Scott M. Lilja
Nicole M. Deforge
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of December, 2007, I caused to be mailed, first-class, postage prepaid, two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT, to:

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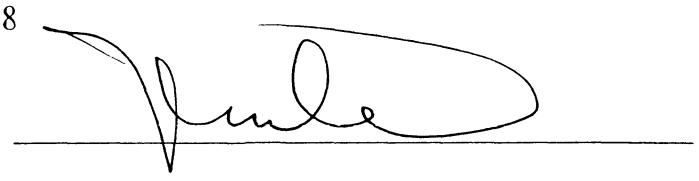

EXHIBIT A

THE UTAH COURT OF APPEALS

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Arbogast Family Trust, by and through Rodney J. Arbogast as Trustee,	)	ORDER
Plaintiff and Appellee,	)	Case No 20070395-CA
v	)	
River Crossings, LLC, a Nevada limited liability company,	)	
Defendant and Appellant.	)	

This case is before the court on Appellee Arbogast Family Trust's motion for summary disposition and request for sanctions

It is undisputed that Appellant River Crossings filed a timely notice of appeal measured from the entry of the order denying the motion for relief from judgment on April 18, 2007 It is well-settled that an order denying relief under rule 60(b) of the Utah Rules of Civil Procedure is a final appealable order See Amica Mut Ins. Co. v Schettler, 768 P 2d 950, 970 (Utah App. 1989). Accordingly, this court has jurisdiction over the timely appeal from the denial of the rule 60(b) motion River Crossings concedes that it "is not attempting to directly appeal the default judgment itself, but merely seeking to have it set aside through a successful appeal of the order denying its Rule 60(b) motion." Based on the foregoing,

IT IS HEREBY ORDERED that Appellee's motion for summary disposition and its request for sanctions are each denied The appeal shall proceed to the next procedural stage

DATED this 15th day of June, 2007.

FOR THE COURT:

Pamela T. Greenwood,
Associate Presiding Judge

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2007, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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Dated this June 15, 2007.

By Marilyn Hammond
Deputy Clerk

Case No. 20070395
District Court No. 060500096